

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

LAMAR A. PEARSON,

Plaintiff,

V.

MICHAEL J. ASTRUE,  
Commissioner of Social Security,

Defendant.

Civil Action No.

## **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

COMES NOW Plaintiff, by counsel, and for this cause of action states:

### **Jurisdiction and Venue**

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel the production of records concerning Plaintiff’s scheduled hearing before Defendant’s Administrative Law Judge (“ALJ”) pursuant to Plaintiff’s Request for Hearing following Defendant’s disability claim denial.

2. Jurisdiction is conferred upon this Court by 5 U.S.C. § 552(a)(4)(B).

3. Plaintiff is a resident of St. Louis County, Missouri.

4. This action is brought in the judicial district in which Plaintiff resides and venue is proper in this Eastern Division of the Eastern District of Missouri.

### **Parties**

5. Defendant is the Commissioner of Social Security and as such has full power and responsibility for administration of the Social Security Act and Regulations.
6. Defendant is in possession of the records requested by Plaintiff.
7. Defendant was the recipient of Plaintiff's request for records under FOIA.
8. Plaintiff is the requester of the withheld records, by and through counsel.

### **Facts**

#### **Background**

9. Defendant has scheduled Plaintiff for a hearing to be held before an unnamed ALJ in Creve Coeur, Missouri on April 19, 2012. In the section following "Sincerely" that would normally provide the name of the assigned ALJ, the Notice provides only a blank space, followed by "Social Security Administration." A true and accurate copy of the Notice of Hearing is attached as Plaintiff's Exhibit A.
10. Hearings to be held before an ALJ involve the review of otherwise private medical records, and those records are not viewed by judges other than the ALJ assigned by Defendant to the claim at the time.
11. At the level of Plaintiff's claim (the ALJ hearing), no more than one ALJ is assigned to a claim at one time, although the assignment of an ALJ can change under limited circumstances such as illness.
12. When the Notice of Hearing is issued, a single ALJ has been assigned to the claim by Defendant, and it is that ALJ who sets the time and place for the hearing.

13. For more than twenty years—until December 2011—Defendant routinely provided claimants and their representatives with a Notice of Hearing that included the last name of the judge who was expected to conduct the scheduled hearing.

14. Upon information and belief—in December 2011—Defendant instructed ALJ hearing offices to conceal the name of the judge from the claimant and claimant’s representative until the day of the hearing (“Defendant’s Secret ALJ Policy”).

15. Upon information and belief, Defendant’s Secret ALJ Policy was communicated orally by an internal telephone conference, without the participation of or notice to the general public.

16. Upon information and belief, Defendant’s Secret ALJ Policy is not described in any written or online publication available to the general public.

17. Defendant continues to publish (and has not published notice of intent to withdraw) regulations that Plaintiff cannot comply with under Defendant’s Secret ALJ Policy, including:

20 C.F.R. § 416.1435—“Each party shall make every effort to be sure that all material evidence is received by the administrative law judge or is available at the time and place set for the hearing.”

20 C.F.R. § 416.1436(a)—“The administrative law judge sets the time and place for the hearing. He or she may change the time and place, if it is necessary. After sending you reasonable notice of the proposed action, the administrative law judge may ...”

20 C.F.R. § 416.1436(d)—“If you object to the time or place of your hearing, you must notify the administrative law judge at the earliest possible opportunity before the time set for the hearing.”

20 C.F.R. § 416.1439—“If you object to the issues to be decided upon at the hearing, you must notify the administrative law judge in writing at the earliest possible opportunity before the time set for the hearing.”

20 C.F.R. § 416.1440—“An administrative law judge shall not conduct a hearing if he or she is prejudiced or partial with respect to any party or has

an interest in the matter pending for decision. If you object to the administrative law judge who will conduct the hearing, you must notify the administrative law judge at your earliest opportunity.”

18. In accord with the published regulations, Defendant’s website continues to inform the general public that, if a hearing is scheduled before an ALJ, the claimant will have a need to communicate directly with the assigned ALJ pre-hearing. For example,

<http://www.socialsecurity.gov/ssi/text-appeals-ussi.htm> provides the following direction to

Supplemental Security Income claimants who have a hearing scheduled before an ALJ:

If for any reason you cannot make it, **contact the judge as soon as possible before the hearing** and explain why. If you do not attend the scheduled hearing, you may lose your appeal rights and benefits.

We may pay you for travel costs if the distance to the hearing from your home is more than 75 miles one way. If you need money for travel costs, **tell the judge as soon as possible before the hearing.**

...

The judge may ask other witnesses, such as medical experts to come to the hearing. **You may ask the judge to order certain witnesses to attend the hearing.**

### FOIA Request

19. On February 9, 2012, Plaintiff, by and through counsel, submitted to Defendant a FOIA request for a record that would identify the last name of the judge then scheduled to conduct the hearing.

20. Plaintiff, by and through counsel, mailed the FOIA request letter to the Hearing Office Director of the hearings office in which the hearing is scheduled to be held. A true and accurate copy of the letter is attached as Plaintiff’s Exhibit B.

21. Plaintiff, by and through counsel, mailed the same FOIA request letter to the “SSA Office of Privacy and Disclosure,” 617 Altmeyer Building, 6401 Security Blvd., Baltimore, MD 21235.

22. Defendant maintains a website intended for use by the general public and claimants—[www.socialsecurity.gov](http://www.socialsecurity.gov).

23. By publication on Defendant’s website, Defendant encourages the submission of FOIA requests by mail to the address used by Plaintiff for submission of the FOIA request letter.

24. Plaintiff, by and through counsel, also faxed the FOIA request letter to the Hearing Office Director of the hearings office in which the hearing is scheduled to be held. A true and accurate copy of the fax confirmation is attached as Plaintiff’s Exhibit C.

25. Plaintiff’s request was for the last name of the ALJ assigned to conduct Plaintiff’s hearing and for the written policy under which the identity of the assigned judge was omitted from the Notice of Hearing and concealed until the hearing.

26. Upon information and belief, Defendant received Plaintiff’s FOIA requests on or before February 10, 2012.

27. Defendant is in possession of multiple records, any of which would enable Defendant to satisfy Plaintiff’s FOIA request for the identity of the assigned ALJ.

28. Defendant could fully satisfy Plaintiff’s FOIA request in less than five minutes and with one page.

29. Defendant has not replied to Plaintiff’s FOIA request in any way.

30. The time limits have passed for Defendant’s response as provided in 5 U.S.C. § 552(a)(6)(A).

31. Defendant's Secret ALJ Policy limits Plaintiff's ability to prepare for the scheduled disability hearing because Defendant's ALJ's have differing expectations for pre-hearing contact in the form of written briefs and notice regarding the status of the evidentiary record.

32. Defendant's Secret ALJ Policy limits Plaintiff's ability to prepare for the scheduled disability hearing and avoid delay because Plaintiff cannot determine if there is a conflict with the individual ALJ until the day of the hearing.

33. Defendant's Secret ALJ Policy limits Plaintiff's ability to prepare for the scheduled disability hearing and avoid delay because Defendant's ALJ's have different requirements for the submission of medical records and other evidence. For example, some of Defendant's ALJs require the submission of all available pages in the record of a hospitalization, while other ALJs require the submission of only discharge summaries and key objective findings. For another example, some of Defendant's ALJs require the submission of online database reports of a claimant's litigation history, while other ALJs expect counsel to avoid the submission of evidence that predates the alleged onset date of disability.

34. Defendant's Secret ALJ Policy limits Plaintiff's ability to prepare for the scheduled disability hearing and avoid delay because Defendant's ALJs conduct hearings in very different ways and Plaintiff will be much less prepared for the hearing without advance knowledge of the name of the judge and an opportunity to consult with counsel. For example, some of Defendant's ALJs ask most of the questions of the claimant, while other ALJs expect counsel to ask most of the questions. For another example, some of Defendant's ALJs encourage consultation with counsel during the hearing, while other ALJs forbid it. For another example, some of Defendant's ALJs routinely conduct a hearing for more than an hour, while

other ALJs expect the hearing to last half as long. For another example, some of Defendant's ALJs permit counsel to ask a vocational expert to refer to an exhibit in the medical record and opine as to its vocational implications if it were credited, while other ALJs forbid such questioning.

35. Defendant has improperly withheld the record sought.

36. Defendant's failure to comply with Plaintiff's FOIA request has been arbitrary and capricious.

37. Plaintiff has exhausted administrative remedies.

38. Plaintiff's hearing before the ALJ is scheduled for April 19, 2012. Prompt release of this information is essential to meeting Plaintiff's deadlines for pre-hearing preparation. Plaintiff anticipates that Plaintiff will learn the name of the ALJ on April 19, 2012, but by then the Plaintiff will have already been damaged by Defendant's refusal to provide the information.

### **Claim**

I. Plaintiff has a statutory right to the record sought, and there is no legal basis for Defendant's refusal to disclose them.

### **Prayer for Relief**

WHEREFORE, Plaintiff requests that this Court:

1. Declare that Defendant's refusal to disclose the record requested by Plaintiff is unlawful;
2. Order Defendant to make the requested record available to Plaintiff;

3. Enjoin Defendant from relying on an invalid practice in all future FOIA requests filed by claimants with scheduled ALJ hearings, who are seeking a record of the last name of the ALJ;
4. Declare Defendant's actions to be violative of FOIA;
5. Make specific findings of fact regarding Defendant's arbitrary and capricious violation of FOIA, and refer the matter to Special Counsel and/or the Merit Systems Protection Board for investigation as provided in 5 U.S.C. § 552(a)(4)(F);
6. Expedite this proceeding as provided for in 28 U.S.C. § 1657;
7. Award Plaintiff costs and reasonable attorney's fees in this action as provided by 5 U.S.C. § 552(a)(4)(E); and
8. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

By: /s/ David D. Camp  
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